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In The

SUPREME COURT OF THE UNITED STATES

October Term, ~~1963~~ 1964

No. ~~344~~

WYLIE A. CAMPBELL, JR.,
WILLIS LONZER, JR. and
JAMES D. WALKER,
Petitioners,

v.

COMMONWEALTH OF VIRGINIA,
Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States.

Petitioners pray for a writ of certiorari to review judgments of the Supreme Court of Appeals of Virginia entered April 24, 1964 (Appendix A), by which that court denied writs of error to judgments of the Hustings Court of the City of Richmond entered October 16, 1963 (R. p. 15)

convicting each of the petitioners of a misdemeanor charge; the effect of the denials of writs of error being affirmance of the judgments of the said Hustings Court.

OPINIONS BELOW

No opinion was given by either of the state courts.

JURISDICTION

Each of the judgments of the Supreme Court of Appeals of Virginia was dated and entered on April 24, 1964. Petitioners have not sought a rehearing or an extension of time within which to petition for certiorari. Jurisdiction of this court is invoked pursuant to Title 28, United States Code, Section 1257 (3): rights, privileges and immunities having been specially set up and claimed under the Constitution and statutes of the United States.

THE QUESTIONS PRESENTED FOR REVIEW

1. Where each of three warrants charged that the male defendant "did make improper advances, gestures and indecent proposals" to a female and the evidence was that an unidentified one of them made such indecent proposal but that shortly thereafter all of them in unison yelled an insulting epithet at said female, does the Due Process Clause of the Fourteenth Amendment require the trial judge to grant the defendants' request that the jury be instructed that the verdict should relate only to the charge stated in the warrant?

2. Absent a charge of proof that the defendants had conspired to do anything, were the defendants denied due

process when the jury was instructed that it might convict the defendants of conspiracy?

3. Where a statute provides a specific punishment for a person who uses grossly insulting language to any female of good character or reputation, may a state, consistently with constitutional requirements of due process and equal protection, subject the accused to a greater penalty merely by denominating a lesser included offense as "disorderly conduct"?

4. Is a prima facie case of racial discrimination in jury selection made out by proof that during more than seven years next preceding, in a city where Negroes constitute more than thirty-seven per cent of the adult population, of 222 juries trying criminal cases no jury has had more than 2 Negroes, only six of 143 five-man juries had as many as 2 Negroes, only four of 79 twelve-man juries had as many as 2 Negroes, and 142 juries have had no Negroes?

5. Was the evidence showing systematic limitation of Negroes in jury selection overcome by testimony which merely showed that the jury commissioners picked what they believed to be fine colored citizens?

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States read as follows:

> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws."

Section 18.1-254, Code of Virginia (1950), Vol. 4, page 271, reads as follows:

"§ 18.1-254. Riotous or disorderly conduct in other public places; disturbance in public conveyance; local ordinances.—If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any other public place, other than those mentioned in the preceding section, or causes any unnecessary disturbance in or on any public conveyance, by running through it, climbing through windows or upon seats, failing to move to another seat when lawfully requested to so move by the operator, or otherwise annoying passengers or employees therein, he shall be guilty of a misdemeanor. * * *"

Section 18.1-9, Code of Virginia (1950), Vol. 4, page 152, reads as follows:

"§ 18.1-9. How misdemeanors punished.—A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punished by fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months, or both, in the discretion of the jury or of the court trying the case without a jury."

Section 18.1-237, Code of Virginia (1950), Vol. 4, page 267, reads as follows:

"§ 18.1-237. Profane swearing and drunkenness.—If

any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than one nor more than ten dollars. * * *"

Section 18.1-256, Code of Virginia (1950), Vol. 4, page 273, reads as follows:

"§ 18.1-256. Slander and libel.—If any person shall falsely utter and speak, or falsely write and publish, of and concerning any female of chaste character, any words derogatory of such female's character for virtue and chastity, or imputing to such female acts not virtuous and chaste, he shall be punished by a fine of not less than twenty-five nor more than five hundred dollars, or by confinement in jail for not more than six months, or both. And if any person shall falsely utter and speak, or falsely write and publish, of and concerning another person, any words which from their usual construction and common acceptation are construed as insults and tend to violence and breach of the peace or shall use grossly insulting language to any female of good character or reputation, he shall be punished by a fine of not less than five dollars or by confinement in jail for not more than sixty days, or both.

The defendant shall be entitled to prove upon trial in mitigation of the punishment, the provocation which induced the libelous or slanderous words, or any other fact or circumstances tending to disprove malice, or lessen the criminality of the offense."

Section 18.1-255, Code of Virginia (1950), Vol. 4, page 272, reads as follows:

"§ 18.1-255. Punishment for using abusive language to another.—If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent, abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a disdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five hundred dollars, in the discretion of the jury or the judge trying the case without a jury."

STATEMENT OF THE CASE

I

Racial Discrimination In Jury Selection

Before the jury was sworn, petitioners filed a motion to quash the writ of venire facias upon the ground that pursuant to a custom, usage and practice of deliberate and virtual exclusion of Negroes from trial jury service, persons of the race of the petitioners had been systematically excluded from the panel from which the jury had been selected, all to the prejudice of the petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution. (R. 9, 10, 11). In support of their motion petitioners presented evidence as is next summarized.

In the City of Richmond, Negroes constitute more than thirty-seven percent of the adult population. In 1950 they constituted almost one-fourth. (R. 9, T. 8.)[1] It does not

[1] T. refers to the transcript of the October 15, 16, 1963 trial in the Hustings Court.

appear that any Negro has ever served as a jury commissioner (T. 55). Of one hundred forty-three misdemeanor prosecutions tried by juries in the Hustings Court since January of 1956, only six juries had as many as two members who were Negroes, no jury has had more than two members who were Negroes, and one hundred one juries have had no Negroes as jurors; and of the seventy-nine felony prosecutions tried by juries in said court since the same date, only four juries have had as many as two members who were Negroes, no jury has had more than two members who were Negroes, and forty-one juries have had no Negroes as jurors (T. 12, 13). Only white men were included in the panel from which the jury for the instant case was selected. (T. 19).

One of the jury commissioners, called by the trial court to explain his method of jury selection, testified that he picked citizens that he knew to be good people. He explained that he and his fellow commissioner had to supply approximately 7500 names to the four courts of record in the City of Richmond, that he did not personally know all of the persons selected but that with respect to persons that he did not know, he used work, professions, locations and occupations to determine good jurors, that no conscious effort was made to make proportionate selection from the different precincts or wards of the city,[2] that he and his fellow commissioner knew the general areas of the city in which Negroes live, that ". . . we picked what we believed to be fine colored citizens from every area of the city as we did white citizens," and that ". . . we took an area and picked

[2] Sec. 8-182 of the Code of Virginia, as amended, provides that "The same percentage of population shall betaken from each magisterial district or ward."

from that [area] men known to us, or by general reputation to be good citizens."

He further testified that he did not know of Negroes ever serving as jury commissioners in Richmond.

The motion to quash the writ of venire facias was overruled and the petitioners excepted (T. 84, 85, R. 16). In separate petitions to the Supreme Court of Appeals of Virginia for writs of error, each petitioner assigned as error and argued: "In denying the motion to quash the writ of venire facias, the court required the defendant to submit to trial by a jury selected under a system which effects the severest limitation and virtual exclusion of Negroes from trial jury service, contrary to the due process and equal protection guaranties of the Fourteenth Amendment to the Constitution of the United States." (R. 1, 4, 6).

II

The Offense Charged And The Evidence

Each petitioner was tried on a warrant which, as amended, charged that he "did become disorderly by making improper advances, gestures and indecent proposals" to a female (R. 12, 13, 14).

The scene of the alleged offense was the parking lot of the U-Tote'M grocery store on Brookland Park Boulevard in the City of Richmond, three maps of which are in evidence (Ex. A, B, and G). The time was between 10:00 P.M. and 10:30 P.M. on 30 July, 1963. The two witnesses who testified against the defendants were Nancy Nunnally and her fiance Sanford Crews, a police officer for the City of Richmond who was then off duty and wearing civilian

clothing. The maps are drawn to scale (T. 89-90). The symbols on Defendants' Exhibit A were placed by Nancy Nunnally; those on Defendants' Exhibit B. by Sanford Crews. One of these symbols, measured by the scale of the map, was determined as being 16 feet in length and 6½ feet in width (T. 92). The material testimony of the witnesses for the Commonwealth, here stated in order of the sequence of events, is as follows:

> Crews: I stopped my car right in front of the open doorway of the C-Tote'M. (T. 58.)
>
> Nunnally: I was sitting in the car waiting for Mr. Crews to go in the store and get cigarettes. * * * They [the defendants] were over at the other end of the parking lot . . . carrying on. I do not know exactly what they were saying, some cursing. (T. 27.)
>
> Crews: I got out and started to go into the place (T. 58).
>
> Nunnally: Then as Officer Crews got out to go into the store they started coming along the drive in front of the store * * * in a car. * * * And the car was heading out toward the exit. The saw me and started coming back. (T. 27.) * * * They had started out of the drive, evidently seeing me and backed up a little bit. . . . [As] they were coming toward me [backing up] at a very slow speed, creeping along (T. 34), one of them hollered out and asked me if I wanted to * * * (T. 28). Officer Crews had just about reached the entrance to the store (T. 27) * * * directly in front of the door. Stepped across the door sill, maybe. I didn't look exactly. I cannot say he was outside or one foot across the door sill. (T. 30).

Crews: Just as I reached the entrance this 1955-1956 Ford convertible with the top down pulled up beside my automobile and asking the young lady in it did she want to * *. At that time I turned and I seen them. (T. 58). My back was to the automobile when it was drove up to my car. I was walking to the store. When I heard the remark I turned. (T. 67). [The defendant's car was] sitting still [headed] west. (T. 70). The rear end of it was headed east. The head end was headed west. Exactly opposite as to my position. (T. 71). [Def. Ex. B shows the two cars parallel to each other facing in opposite directions: "x" representing the Crews car and "D-3" representing the defendants' car.]

Nunnally: [The defendants' car was] about a foot or two right in front of mine on an angle almost —it was more or less in front of the car. (T. 27). [Def. Ex. A shows the defendants' car almost perpendicular to that of the complaining witnesses: "x" representing the Crews car and "D-3" representing the defendants' car.]

Nunnally: I took Officer Crews' guns off the dashboard and laid it on the back of the seat so they could see it. (T. 28). I picked up the gun with the intention of using it if I had to. * * * I laid it on the seat so they could see it. I pointed it at no one in general. (T. 35).

Crews: She picked my gun up off the dashboard. (T. 58).

Nunnally: One of them hollered out, the goddamn common white bitch has a gun. Three of them hit the floor. The driver proceeded to pull out. As soon as all

of them got in the street said the goddamn common white bitch. (T. 28).

Crews: One of them, not knowing which one of the four, said the goddamn white bitch has got a gun. The three occupants of the car ducked down below the side of the vehicle, and the driver taken off out into the Boulevard, heading east on the Boulevard. And when they got into the Boulevard they all hollered back, you could hear quite a ways, common goddamn white bitch. (T. 58-59).

The defendants proved prior inconsistent statements of Officer Crews (as to whether he was in or outside of the store), as made in his testimony in Police Court (T. 201) and in an interview by a probation officer of the Juvenile and Domestic Relations Court (T. 106-7). Each defendant denied that he or either of his companions had said anything to Mrs. Nunnally or that either of them had made the remarks alleged (T. 137, 159, 178). Six citizens of prominence testifying as character witnesses made an uncontroverted showing that each of the defendants bore a good reputation for peace and good order and for truth and veracity (T. 140-159).

III

Federal Questions As Raised In Trial Of Case On Its Merits

The defendants requested the court to instruct the jury that the issues were "(1) Whether one of the defendants addressed to Nancy Nunnally the particular question stated in her testimony and (2) if so, which defendant addressed the question." [Refused Instructions A and A-1, R. 25, 26]. In stating for the record the basis for their exception

to the refusal of such instruction, the defendants argued "that to allow a verdict on some other issues [e.g., insulting language or criminal conspiracy] not shown by the warrants is a denial of the due process provision to the Fourteenth Amendment." (T. 205). In their petition to the state's highest court for writs of error, each petitioner assigned as error, and argued: "In overruling the defendant's motion to strike the evidence when made for lack of identification of the person making the alleged 'improper advances [and] gestures [and] indecent proposals' and in denying defendant's instructions A and A-1, the court permitted the jury to base convictions upon alleged conduct which the warrants did not charge; and thus did the court deny due process of law as secured by the Fourteenth Amendment." [R. 1, 4, 6.]

After both sides had rested, the prosecution initially injected into the case a theory of conspiracy by requesting two instructions (6 and 7) [R. 22, 23] the effect of which was that the jury should convict those of the defendants who are shown to have "acted in a conspiracy or common purpose to make the remarks to and concerning Nancy Nunnally." These instructions were granted and the petitioners excepted upon the grounds that there having been neither accusation nor evidence of a conspiracy, a verdict based thereon would be a further denial of due process in violation of the Fourteenth Amendment [T. 206]. In their petitions for writs of error, each petitioner assigned as error, and argued: "In granting Instructions 6 and 7, the court permitted the jury to convict the defendants for conspiracy in the absence of either charge or proof of conspiracy; and thus denied due process of law as secured by the Fourteenth Amendment." [R. 2, 5, 7.]

The defendants excepted to Instruction 8 (R. 24) by

which the court told the jury that, in the event of conviction, punishment should be fixed at a fine of not more than five hundred dollars or by confinement in jail for not more than twelve months or both. The contention of the defendants was that the specific conduct charged was cognizable under Section 18.1-256 of the Code of Virginia 1950, as amended, which provides: "If a person . . . shall use grossly insulting language to any female of good character or reputation he shall be punished by a fine of not less than five dollars or by confinement in jail for not more than sixty days, or both." Specifically, the petitioners claimed that it would be a violation of due process to permit the prosecuting attorney to ask for a greater penalty than that provided in the cited statute by arbitrarily labeling as "disorderly conduct" the acts with which the defendants were charged when that act falls within the inhibition of the specific statute (T. 206, 207). In his petition to the state appellate court, each petitioner assigned as error and argued: "In denying the motion to strike the evidence and in granting Instruction 8, the court placed a construction upon the disorderly conduct statute (Code of Virginia, Sec. 181-254) which does not square with the expressed legislative intent which, by virtue of the Due Process Clause of the Fourteenth Admentment, would render the disorderly conduct statute void for vagueness." (R. 2, 5, 7.)

SUMMARY OF ARGUMENT

1. The Supreme Court of Appeals of Virginia has decided in this case that a defendant charged with one offense can be convicted of a different offense (for which no charge has been made) when there is no evidence in the record to support a conviction for either offense.

Although each of the petitioners was charged with "making improper advances, gestures and indecent proposals" to a female, the trial court refused their instruction tendering that issue to the jury but instead instructed them in language tendering another issue, thus denying them notice of the specific charge in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States. (pages 15-16)

2. The failure of the Commonwealth to provide notice as disscussed above was compounded by the Court's instruction permitting the jury to convict the petitioners of an offense when there was no evidence to support such conviction. (pages 16-19)

3. By permitting the petitioners to be convicted under a general disorderly conduct statute which provides a heavier penalty for an alleged offense specifically proscribed by another statute which provides a lesser penalty, the court subjected the petitioners to a greater penalty than that contemplated by the legislature in violation of petitioners' right not to be denied "due process of law". (pages 19-21)

4. The petitioners proved a long continued and consistent pattern of limitation and exclusion of Negroes from jury service in the City of Richmond, notwithstanding the fact that Negroes comprise more than thirty-seven per cent of the city's adult population. The attempted explanation by the jury commissioner failed to satisfactorily explain the disparity between the sparse number of Negroes serving on juries and their high percentage of the adult population. (pages 21-25)

In each of the foregoing instances, the Supreme Court of Appeals of Virginia has decided a federal question of substance in a way not in accord with the applicable decisions of this court.

ARGUMENT

I

The Court's Refusal To Limit The Jury's Considerations To The Offense Charged Constituted A Denial Of Due Process.

Each petitioner was charged with having made improper advances, gestures and indecent proposals. The evidence was that such an indecent proposal was made by an unidentified one of a party of four which included the three petitioners. Clearly, neither of the accused could have been convicted under the law of the case,[3] as stated in Instruction 5, viz:

> ". . . [W]hen two or more persons had the same opportunity to commit an offense, and if upon the whole evidence there remains a reasonable doubt as to which one committed it, neither of them can be convicted." (See *Jolly* v. *Commonwealth*, 136 Va. 750, 764, 118 SE 109, citing *Burton* v. *Commonwealth*, 122 Va. 847, 94 SE 923).

The only testimony tending to show that either of the petitioners committed any unlawful act is the testimony that as they left the parking lot they, in unison, shouted

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[3] An instruction given without objection and exception becomes the law of the case. See *Shamblee* v. *Transit Co.*, 204 Va. 501, 504, 132 SE 2d 712 (1963) and cases cited.

an epithet at the prosecutrix. The trial court permitted the jury to make that alleged epithet the basis of conviction not only when it refused Instruction A and A-1 which would have limited the jury's consideration to the charge stated in the warrants, but also when it granted Instruction 6 by which the jury's attention was directed to "remarks to *and concerning*" the prosecutrix.

In the case of *Cole* v. *Arkansas*, 333 U.S. 196, 201, 92 L. Ed. 644, 68 S. Ct. 514, 517 (1948) this Court stated the controlling principles, viz:

> "No principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal. *In Re Oliver*, 333 U.S. 257, 68 S. Ct. 499 (1948), and cases there cited. * * * It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. *De Jonge* v. *State of Oregon*, 299 U.S. 353, 362, 57 S. Ct. 255, 259, 81 L. Ed. 278 (1937)."

II

Due Process Was Denied When, Notwithstanding The Total Absence Of Charge Or Proof Of Conspiracy, The Court Told The Jury To Convict Those Who Had Conspired And To Acquit Those Who Had Not.

The first suggestion of a conspiracy was injected into the case after both sides had rested. The prosecution re-

quest d and, over objection by the petitioners, the trial court granted Instructions 6 and 7, viz:

> "The Court instructs the jury that if you believe from the evidence beyond a reasonable doubt that the defendants acted in a conspiracy or common purpose to make the remarks to and concerning Nancy Nunnally; that the remarks were made as testified; and that the making of the remarks constituted disorderly conduct in public, then you should find a verdict of guilty against the two or three of the defendants who you find so conspired and a verdict of not guilty as to any one of the defendants who did not so conspire."
>
> "You are further instructed that if you do not believe from the evidence beyond a reasonable doubt that a conspiracy or common purpose existed then you shall find all three of the defendants not guilty."
>
> "In order to show a community of the unlawful purpose, it is not necessary to show an express agreement or an understanding between the parties. A conspiracy or common purpose may be inferred from the circumstances; preconcert may be shown by circumstances as well as by direct evidence."

The failure of the prosecution to sustain the charges made in the warrants has been discussed. By granting the instructions above quoted, the trial court subjected the petitioners to conviction of an offense with which they had not been charged and as to which there was no evidence. This action by the trial court was in patent disregard of several admonitions of the Court of which we mention but a few.

In *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1959) this Court reversed a conviction for unlawfully interfering with interstate commerce in violation of the Hobbs Act when the indictment had charged obstruction of the movement of sand into the State of Pennsylvania and the Government had been permitted, over objection, to show possible future interference with steel shipments from Pennsylvania to Michigan and Kentucky. The case holds that the submission of the possible future interference with steel shipments "cannot be dismissed as merely an insignificant variance between allegation and proof" (361 U.S. at 215); and "that the variation destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury". (361 U.S. at 217).

An apt analogy to the instant case is found in the conclusion of the Court in *Parr* v. *United States*, 363 U.S. 370, 393-4, 80 S. Ct. 1171, 1185, 4 L. Ed. 2d 1277 (1960), viz: "[T]he showing, however convincing, that state crimes of misappropriation, conversion, embezzlement and theft were committed does not establish the federal crime of using the mails to defraud, and, under our vaunted legal system, no man, however bad his behavior, may be convicted of a crime of which he was not charged, proven and found guilty in accordance with due process."

In the instant case, we not only have a variance between the alleged indecent proposal and the conviction based upon a supposition of a conspiracy to make remarks concerning the prosecutrix, but we have no evidence to support the theory of conspiracy which the trial court charged the jury to use as its measure in determining guilt or innocence. The offense charged in the warrant notwithstanding, the

jury convicted of conspiracy as to which there was no evidence! The Constitutional defect is clearly pointed out in the words of this Court in *Thompson* v. *City of Louisville*, 362 U.S. 199, 206, 80 S. Ct. 624, 629, 4 L. Ed. 2d 654 (1960) and the cases there cited, viz: "Just as 'Conviction upon a charge not made would be a sheer denial of due process' so is it a violation of due process to convict and punish a man without evidence of his guilt". See also *Garner* v. *Louisiana*, 368 U.S. 157, 82 S. Ct. 248, 7 L. Ed. 2d 207 (1961); *Thornhill* v. *Alabama*, 310 U.S. 88, 60 S. Ct. 736 (1940), 84 L. Ed. 1093 reversing 189 So. 913, 28 Ala. App. 527; *DeJonge* v. *Oregon*, 299 U.S. 353, 57 S. Ct. 255, 81 L. Ed. 278 (1937); *Stromberg* v. *California*, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117.

III

Due Process Was Denied When The Acts Mentioned In The Warrants And Described In The Evidence Were Tried And Punished As Disorderly Conduct Rather Than As Violations Of Statutes Specifically Proscribing Such Acts.

The acts charged by the warrant are "making improper advances, gestures and indecent proposals" to a female. Relevant evidence tended to show an indecent proposal. Irrelevant evidence tended to show the use of abusive language. The alleged indecent proposal was clearly forbidden by Section 18.1-256 of the Code of Virginia, 1950, the pertinent part of which is:

> "And if any person . . . shall use grossly insulting language to any female of good character or reputation, he shall be punished by a fine of not less than two

dollars or by confinement in jail for not more than sixty days or both."

The use of abusive language would be a violation of Section 18.1-255 of the Code of Virginia, viz:

> "If any person shall, in the presence or hearing of another, curse or abuse such other person, or use any violent abusive language to such person concerning himself or any of his relations, or otherwise use such language, under circumstances reasonably calculated to provoke a breach of the peace, he shall be guilty of a misdemeanor, and on conviction fined in any sum not less than two dollars and fifty cents nor more than five hundred dollars, in the discretion of the jury or the judge trying the case without a jury."

Or the abusive language might have been punished under Section 18.1-237 of the Code of Virginia, viz:

> "If any person arrived at the age of discretion profanely curse or swear or get or be drunk in public he shall be deemed guilty of a misdemeanor and upon conviction thereof be fined not less than one nor more than ten dollars."

With the approval of the trial court, the prosecutor arbitrarily charged the acts mentioned in the warrant as a violation of the disorderly conduct statute (Section 18.1-254 of the Code of Virginia) the material part of which is:

> "If any person behaves in a riotous or disorderly manner in any street, highway, public building, or any

other public place . . . he shall be guilty of a misdemeanor."

Thus the Commonwealth subjected the petitioners to the greater punishment set forth in Section 18.1-9 of the Code of Virginia, viz:

> "A misdemeanor for which no punishment or no maximum punishment is prescribed by statute shall be punished by fine not exceeding five hundred dollars or confinement in jail not exceeding twelve months, or both, in the discretion of the jury or of the court trying the case without a jury."

"As between a general statute embracing the crime and a statute specifically relating to the offense charged, the special statute governs the extent of punishment." (24B C.J.S. 569, Criminal Law Sec. 1982, note 27, citing, *U. S. v. McKenney*, D.C.N.Y., 181 F. Supp. 143, affd., C.A., 281 F. 2d 908, cert. den. 366 U.S 960, 81 S Ct. 1916, 6 L. Ed. 2d 1253, and 366 U.S. 967, 81 S. Ct. 1929, 6 L. Ed 2d 1257, reh. den. 368 U.S. 871, 82 S. Ct. 26, 7 L. Ed. 2d 72).

IV

Proof Of Long Continued And Consistent Limitation Of Number Of Negroes Summoned For Jury Service Is Prima Facie Proof Of Systematic Racial Discrimination In Jury Selection

The petitioners proved that in the City of Richmond, Virginia, where more than thirty-seven percent of the adult population are Negroes, during a period of nearly eight

years only six of 143 misdemeanor juries (of five persons) had as many as two Negroes and only four of 79 felony juries (of twelve persons) had as many as two Negroes and 142 of the 222 juries have had no Negroes. This evidences that "token" summoning of Negroes which in *Smith* v. *State of Texas*, 311 U.S. 128, 61 S. Ct. 164, 85 L. Ed. 84, was found insufficient to comply with the Constitution's requirement of equal protection. Chance and accident alone could hardly have brought about the use of so few Negroes for jury service where persons of that race constitute such a large segment of the population.

V

The Prima Facie Showing Of Racial Discrimination In Jury Selection Was Strengthened By The Testimony That The Jury Commissioners Picked What They Believed To Be Fine Colored Citizens.

The jury commissioner, called by the Court, testified on cross examination that he did not know of any Negroes ever serving as jury commissioners.

The commissioner also testified that "we took an area and picked from that [area] men known to us or by reputation to be good citizens. . . . I think we picked what we believed to be fine colored citizens from every area of the city as we did white citizens".

As stated by this court in *Smith* v. *Texas*, *supra*

> "Where jury commissioners limit those from whom . . . juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as from commis-

> sioners who know but eliminate them. If there has been discrimination, whether accomplished ingeniously or ingenuously, the conviction cannot stand."

It appears that the commissioners were not attempting to give proportionate representation to election precincts or other geographic areas (T. 48).[4] It further appears that they know as a matter of general information the general areas of the city in which Negroes live (T. 53). Their objective source of names was the city directory (T. 42, 43) and from that source they selected persons who in their opinion would make good jurors.

It is quite possible that through the years jury commissioners have picked what they believed to be fine colored citizens from every area of the city. The fact that Negroes called for jury service are so few that they can invariably be eliminated by the exercise of the peremptory challenges allowed one side is quite consistent with a supposition that in selecting Negroes the commissioners have picked none but those whom they affirmatively believed to be "fine colored citizens" and in selecting whites they have eliminated only those who in their opinion would not make good jurors. With the city directory as the source of names there is no other rational explanation for the disparity.

The controlling principles of law have been often stated by this Court. We quote from *Brown v. Allen*, 344 U.S. 443, 73 S. Ct. 397 (1953) 97 L. Ed. 469

[4] Such proportioning is required by Sec. 8-182 of the Code of Virginia (1950) as Amended, which provides in part: "The same percentage of population shall be taken from each magisterial district or ward."

"Discriminations against a race by barring or limiting citizens from participation in jury service are odious to our thought and our Constitution. * * * [V]ariations in proportions of Negroes and whites on jury lists from racial proportions in the population have not been considered violative of the Constitution where they are explained and not long continued. Akins v. State of Texas, 325 U.S. 398, 403 . . . Of course, token summoning of Negroes does not comply with equal protection. Smith v. State of Texas, 311 U.S. 128." (344 U.S. at 470-71.)

* * *

"The fact that causes further consideration in this case of the selection of prospective jurors is that the tax lists show 8,233 individual taxpayers in Vance County of whom 3,136 or 38% are Negroes. In the jury box involved, selected from that list, there were 2,126 names. Of that number 145 were Negroes, 7%. This disparity between the races would not be accepted by this Court solely on the evidence of the clerk of the commissioners that he selected names of citizens 'of good moral character and qualified to serve as jurors, and who had paid their taxes.' It would not be assumed that in Vance County there is not a much larger percentage of Negroes with qualifications of jurymen." (344 U.S. at 481.)

The reasoning of the Court in *Brown* v. *Allen*, *supra*, compels the conclusion here that the long continued variations in proportion, to the prejudice of Negroes, have not been explained and, hence, are deemed violative of the Constitution. See also *United States ex rel Goldsby* v. *Harpole*, 263 F. 2d 71 (5th Cir. 1959); *United States ex*

rel Seals v. *Wiman*, 304 F. 2d 53 (5th Cir. 1962), *Bailey* v. *Henslee*, 287 F. 2d 936 (8th Cir. 1961).

CONCLUSION

Wherefore, for the reasons hereinabove stated, it is respectfully submitted that this petition should be granted.

S. W. Tucker
Henry L. Marsh, III
214 East Clay Street
Richmond 19, Virginia
Attorneys for Petitioners

CERTIFICATE OF SERVICE

I, Henry L. Marsh, III, a member of the Bar of the United States Supreme Court, and of counsel for Petitioners, hereby certify that the attached Petition for a Writ of Certiorari was served on the Respondent by depositing in the United States Mail, with first class postage prepaid copies thereof addressed to James B. Wilkerson, Esquire and J. Alvernon Smith, Esquire, Assistant Commonwealth's Attorney, City Hall, Richmond, Virginia its counsel of record, this 24 day of July, 1964.

Henry L. Marsh, III

APPENDIX

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 24th day of April, 1964.

The petition of Wylie A. Cambell, Jr., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 10th day of October, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said Hustings court.

A copy, Teste:

H. TURNER
Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 24th day of April, 1964.

The petition of James D. Walker for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 10th day of October, 1963, in a prosecution by the Commonwealth against the

said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A copy, Teste:

H. TURNER
Clerk

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Friday the 24th day of April, 1964.

The petition of Willis L. Lonzer, Jr., for a writ of error and supersedeas to a judgment rendered by the Hustings Court of the City of Richmond on the 10th day of October, 1963, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor, having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the court being of opinion that the said judgment is plainly right, doth reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said hustings court.

A copy, Teste:

H. TURNER
Clerk